

ORIGINAL

Before the
Federal Communications Commission
 Washington, DC 20554

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JAN 14 2004

Federal Communication Commission
 Bureau / Office

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments)

FM Broadcast Stations)

(Crisfield, Maryland, Belle Haven,)

Nassawadox, Exmore and Poquoson, Virginia))

MM Docket No.02-76

RM-10405

RM-10499

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JAN 28 2004

To: Assistant Chief, Audio Division, Media Bureau.

Federal Communications Commission
 Office of the Secretary

SUR-REPLY TO
REPLY TO CONSOLIDATED RESPONSE TO PETITIONS FOR RECONSIDERATION

Commonwealth Broadcasting, L.L.C., and Sinclair Telecable, Inc., dba Sinclair Communications (collectively "Sinclair") hereby submit this Sur-reply (the "Sur-reply") in response to the "Reply to Consolidated Response to Petitions for Reconsideration" (the "Reply") in the above-captioned proceeding filed by Tidewater Communications, LLC ("Tidewater") on December 31, 2003.

The Commission should consider this Sur-reply on the merits in this proceeding as a matter of due process pursuant to its discretion under 47 C.F.R. § 1.415(d). In this Sur-reply, Sinclair will offer only a response to new matters improperly raised by Tidewater in its Reply – matters raised in violation of 47 C.F.R. § 1.45(c)¹. Specifically, Tidewater has proffered for the first time a set of statements from two purported mapping experts in an attempt to undermine the validity of the FCC's reliance on World Wide Web-based United States Geological Survey ("USGS") maps to ascertain Sinclair's proposed transmitter site. Tidewater should have submitted these declarations previously in one of its numerous pleadings attacking the location

¹ "The reply shall be limited to matters raised in the oppositions"

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of Sinclair's proposed Poquoson site. At the very least, in this reconsideration proceeding, 47 C.F.R. § 1.45(c) required Tidewater to raise these matters in its Petition for Reconsideration and not at the end of the pleading cycle.

Even if these declarations were properly placed in the record, which they were not, they do not support Tidewater's central thesis that online maps cease to be USGS maps because they are distributed by a non-governmental entity – and are, therefore, not the type and kind of maps the Commission may properly rely on when determining the permissibility of a proposed tower site under 47 C.F.R. § 73.312(a). Tidewater attempts to create a fog that obscures the simple, unalterable truth: the online maps upon which the Commission relied here are created by USGS. They are merely distributed online by such private entities as the online map site, Maptech – and made accessible to the public by, *inter alia*, a link from the USGS website. They are, in fact, governmental maps that appear on a private website, just as USGS paper maps purchased from private distributors are just as valid as those purchased directly from the Department of the Interior. Indeed, the FCC's own rules counsel that “[t]hese maps may also be secured . . . from authorized agents or dealers in most principal cities.” 47 C.F.R. § 73.312(c). Moreover, the FCC itself has recognized here that online USGS maps are, in fact, government maps. *See Letter of Roy J. Stewart, Chief, Office of Broadcast Policy to Gary S. Smithwick, Esq.*, Nov. 19, 2003 at 1, ¶ 3 (attached hereto as Exhibit 1) (noting the availability of the Poquoson site's “USGS topographic map and navigational photo on-line . . .”)

Legally, USGS treats online distributors in the same way that it treats retail dealers; both are required to enter into standard form agreements with USGS based on statutory and administrative authority. In Section XII of USGS's standard form contract with private-sector partners that distribute its maps and other data, USGS unequivocally asserts the legally-mandated role played by private sector partnerships in the agency's dissemination of maps and

other materials under Titles 43 and 15 of the United States Code². (A copy of the this contract section is attached hereto as Exhibit 2.) For instance, all government agencies, including USGS, “shall disseminate information products on equitable and timely terms and *take advantage of all dissemination channels.*” *Office of Management and Budget Circular A-130*, Sect. 8, Policy, Part A, Information Management Policy, Subsect. 5 (emphasis added). Web sites, such as Maptech’s MapServer, are one channel for such dissemination of USGS mapping data.

As a result of its partnership with Maptech to distribute USGS maps to the public on the World Wide Web, the USGS web site contains a link to Maptech’s site, which USGS describes as a means to “View USGS Maps and Aerial Photo Images Online.”³ The link to Maptech provided on the USGS web site states: “Maptech’s MapServer allows access to the *largest online database of . . . USGS maps available in the world*”⁴ (emphasis added).

Moreover, online map distribution allows users to access the most up-to-date materials. USGS requires that a website accessed through a link from the USGS website “must be well-maintained and *kept current* with respect to the featured USGS product(s)”⁵ (emphasis added). Indeed, the FCC would be remiss if it did not rely on the most up-to-date government mapping data in making the kind of geographic determinations at issue here as its own rules call for using “whichever [map] is the latest.” 47 C.F.R. § 73.312(a). As USGS partners, such as Maptech, are contractually obligated under written agreements with the United States Government to keep current in their offerings of USGS maps, it is clear that the use of Maptech to access USGS maps

² Found at <http://mapping.usgs.gov/www/partners/agreements/retail.html> (visited Jan. 6, 2004).

³ Found at <http://geography.usgs.gov/partners/viewonline.html> (visited Jan. 6, 2004) with a printout attached hereto in Exhibit 3.

⁴ *Id.*

⁵ Found at <http://geography.usgs.gov/partners/viewcriteria.html> (visited Jan. 6, 2004) with a printout attached hereto in Exhibit 4.

complies fully with the Commission's rules because, in plain English, keeping "current" means offering the latest USGS maps available. These are available, in their most up-to-date form, online.

Insofar as Maptech provides appropriate and current USGS maps, the expert testimonials submitted by Tidewater in its Reply actually support Sinclair's position that its proposed Poquoson tower site is on land. One of Tidewater's experts, Donald W. Shackelford, declared that although the Poquoson site appeared to be in water when plotted on a paper map, when viewing USGS maps on the Maptech web site, "the same latitude and longitude location [of the Poquoson site] is indeed on dry land." *Declaration of Donald W. Shackelford* at ¶ 3.

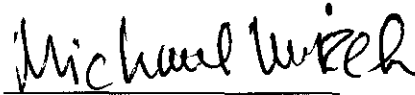
Tidewater's other expert, David F. Maune, stated that when compared to paper maps, digitally-distributed USGS maps have the "same accuracy as they are produced from the original reproducible materials that do not change dimensions with changes in temperature and humidity." *Letter from David R. Maune to Gary S. Smithwick, Esquire* at 2, ¶ 5.

In light of the statutory basis for private distribution of digital USGS maps, and the accuracy and currency provided by digital maps – such as those provided online by Maptech – it is clear that Tidewater is doing no more than puffing smoke to obscure the that Sinclair's Poquoson site is located on dry land. As such, Sinclair's proposal is permissible.

It is time to bring to closure this unnecessarily long pleading cycle and allow the allocated spectrum at issue to be used to provide service to the public – including first local transmission service to Poquoson. Tidewater's technical nit picking notwithstanding, Sinclair stands ready to build its proposed facilities rapidly upon grant. There is no further cause for

delay. The petition for reconsideration should be promptly denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael W. Richards". The signature is written in a cursive, slightly slanted style. Below the signature is a horizontal line.

Howard M. Weiss

Michael W. Richards

*Counsel for Commonwealth Broadcasting, L.L.C.,
and Sinclair Telecable, Inc.*

FLETCHER, HEALD & HILDRETH, P.L.C.
1700 North 17th Street, 11th Floor
Arlington, VA 22209
(703) 812-0400

January 14, 2004

EXHIBIT 1



Federal Communications Commission
Washington, D.C. 20554

NOV 19 2003

Gary S. Smithwick, Esquire
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, D.C. 20016

Dear Mr. Smithwick:

This is in reference to the Freedom of Information Act request (FOIA Control No. 2004-012), whereby you seek copies of the materials from the United States Geological Survey (USGS) internet site that were relied upon by the Media Bureau's Audio Division in MM Docket No. 02-76 to determine that a specified transmitter site is on dry land.

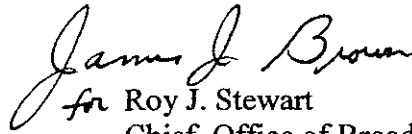
Pursuant to your request, the office files maintained by the Audio Division with respect to MM Docket No. 02-76 were reviewed. That records search, however, did not locate either the USGS topographic map or navigational photo at the site reference coordinates of 37-12-30 North Latitude and 76-25-05 West Longitude. In determining that the site is on dry land, the staff engineer did not generate either document. Rather, he reached his conclusion by viewing the reference coordinates displayed on the USGS topographic map and navigational photo on-line at the USGS internet site.

The Freedom of Information Act creates a right of access to existing documents or other written materials in the possession and control of an agency. It does not require an agency to prepare or generate documents in response to a FOIA request. See Hudgens v. IRS, 620 F. Supp. 18 (D.D.C. 1985), aff'd mem., 808 F. 2d 137 (D.C. Cir. 1987). Notwithstanding the above, we have in the exercise of our discretion accessed again the USGS internet site, plotted the site reference coordinates, and generated the materials that you requested. Copies of the USGS topographic map and navigational photo are enclosed for your information and use.

Pursuant to Section 0.470(a)(1) of the Commission's Rules, commercial use requesters, such as yourself, are assessed charges that recover the full direct cost of searching for, reviewing and duplicating records sought pursuant to the Freedom of Information Act. The search and review costs associated with FOIA 2004-012 amount to \$44.50, the fee for one hour of search time by a GS-13 Electronics Engineer, pursuant to Section 0.467(a) of the Commission's Rules. The charge for duplication of the records being furnished to you is \$0.34 (2 pages @ 17 cents per page, as set forth in Section 0.465(c)(2) of the Commission's Rules). Accordingly, the total charge for processing your FOIA request and furnishing copies of Commission records is \$44.84. The Financial Management Division, Office of Managing Director, Federal Communications Commission, will send you a bill for that amount in the near future. Payment by you remittance made payable to the Federal Communications Commission is due 30 days after receipt of the bill.

I trust the foregoing is responsive to your request.

Sincerely,

James J. Brown
for

Roy J. Stewart
Chief, Office of Broadcast License Policy
Media Bureau

Enclosures

EXHIBIT 2

Navigation Photo

Maptech MapServer - Online Topo Maps, Nautical Charts, Aero Charts, and Nav Photos - Microsoft

Back -> Search Favorites History

File Edit View Favorites Tools

Links Best of the Web Channel Guide Customize Links Flag[1] Free HotMail Internet Start Microsoft RealPlayer

Address <http://mapserver.maptech.com/homepage/index.cfm?dbpid=MAP0060030900%2C1%2C1%2C0&relationtype=DMS>

Coming...

?

Innovative
Intuitive
Integrated

Advanced Search

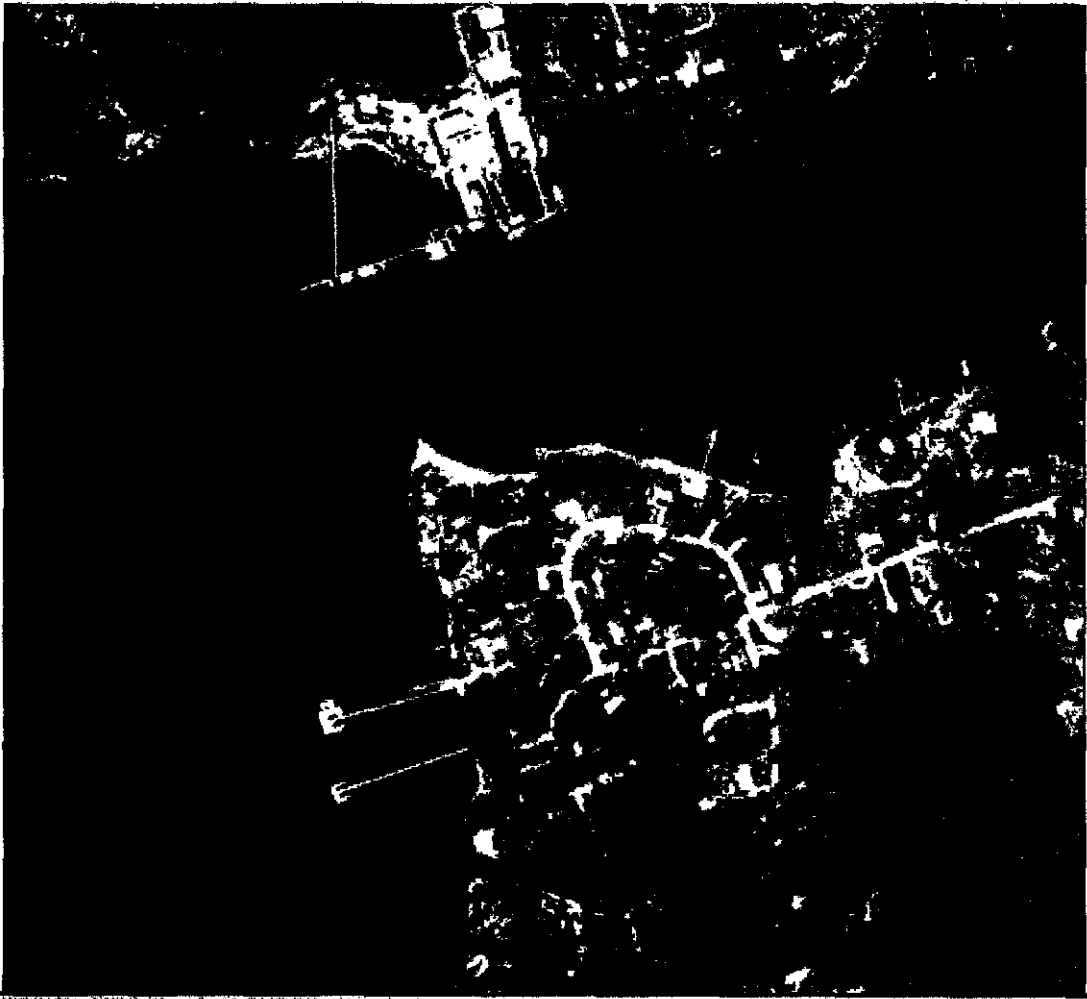
Help

Latitude 37° 12' 30" N

Longitude 76° 25' 05" W

Coordinates DMS

-----FUN TOOLS-----



Click to Center

Start Database Apps Portals CDMS - Version 2.97 ... Maptech MapServ... Document1 - Micros... Internet

EXHIBIT 3

Topographic Map

Maptech MapServer - Online Topo Maps, Nautical Charts, Aero Charts, and Nav Photos - Microsoft

Back

Search

Favorites

History

File

Edit

View

Favorites

Tools

Links

Best of the Web

Channel Guide

Customize Links

Flag[1]

Free HotMail

Internet Start

Microsoft

RealPlayer

Address

cope=dom&scriptfile=http://mapserver.maptech.com/homepage/index.cfm&pid=MAP0060030900%2C1%2C1%2C0&latontype=DMS

Go

ENTER CITY OR PLACE NAME

SELECT STATE

OR ENTER ZIP CODE

Advanced Search

Map

Go

Go

Coming...

is

Innovative

Intuitive

Integrated

Latitude

37° 12' 30" N

Longitude

76° 25' 05" W

Coordinates

DMS

▼

Click to Center

Database Apps Portals

Start

CDBS - Version 2.97 11/1...

Maptech MapServer - ...

Internet

EN

11:48 AM

Topo Map

Nautical Chart

Aeronautical Chart

Nav Photo

LEARN MORE!

Buy Maps & Charts for this Region

be required for all new Business Partners.

XIII. AUTHORITY

- A. Title 43 United States Code Section 42, Distribution of Maps and Atlases, etc :
"The Director of the Geological Survey is authorized and directed, on the approval of the Secretary of the Interior, to dispose of the topographic and geologic maps and atlases of the United States, made and published by the Geological Survey."
- B. Title 43 United States Code Section 45, Production and Sale of Copies of Photographs and Records; Disposition of Receipts: "The Director of the United States Geological Survey on and after March 4, 1909 may produce and sell on a reimbursable basis to interested persons, concerns, and institutions, copies of aerial and other photographs and mosaics...and photographic or photostatic reproductions of records in the official custody of the Director."
- C. Office of Management and Budget Circular A-130 Section 8, Policy, Part A, Information Management Policy, Subsection 5, Providing Information to the Public: "In determining whether and how to disseminate information to the public, agencies shall disseminate information products on equitable and timely terms and take advantage of all dissemination channels."
- D. Title 15 United States Code 5601, Land Remote Sensing Policy Act of 1992, Section 2: "To stimulate the development of the commercial market for unenhanced data and value-added services, the United States Government should adopt a data policy for Landsat 7 which allows competition within the private sector for distribution of unenhanced data and value-added services. Development of the remote sensing market and the provision of commercial value-added services based on remote sensing data should remain exclusively the function of the private sector."

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U.S. Department of the Interior || U.S. Geological Survey

511 National Center, Reston, VA 20192, USA

URL: <http://mapping.usgs.gov/www/partners/agreements/retail.html>

Maintainer: Business Partner Program Coordinator

Last modified: 12:54:12 Tue 20 Nov 2001

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EXHIBIT 3


[Geography Home](#)
[Partnerships](#)
[Products](#)
[Services](#)
[What's New](#)

View USGS Maps and Aerial Photo Images Online

The links below will take you to selected USGS Business Partner Program (BP) and Cooperative Research and Development Agreement (CRADA) partner sites where you may view USGS maps and aerial photo images from your Web browser.



Microsoft TerraServer

Resulting from cooperative research by the USGS and Microsoft Corporation, the TerraServer provides free online access to USGS digital aerial photographs, known as digital orthophoto quadrangles, and to digital topographic maps, known as digital raster graphics. To learn more about these products, visit the USGS [Digital Backyard](#) (CRADA)



MapMart.com by IntraSearch, Inc.

Online ordering of Digital Mapping and Aerial Photography Specializing in USGS products – DLGs, DEMs, DRGs, and DOQQs – as well as custom mapping (BP)



Maptech MapServer by Maptech, Inc.

Maptech's MapServer: Free View, mark locations with an icon, link the icon to any URL, save your icon's location in your personalized "My Maps," and share that with a friend or colleague. Also, print and e-mail USGS topographic maps, digital orthophoto quadrangles, aero charts and NOAA nautical charts online Maptech's MapServer allows access to the largest online database of NOAA digital charts and USGS maps available in the world (BP)



TerraFly by TerraFly.com at Florida International University

TerraFly is an interactive "fly-over" application designed to aid in the dissemination and visualization of geospatial data via the Internet. The incorporation of USGS data could make TerraFly one of the largest databases on the Internet TerraFly will show the user a new and innovative way to explore their digital earth (CRADA)



TopoZone by Maps a la carte, Inc.

TopoZone provides an interactive interface which allows users to view a seamless topographic map and feature database of the entire United States, based on digital raster graphics. The site is accessible to anyone with an industry standard Web browser at no charge (BP)



Earth as Art, by LookClickPrint, Inc.

The USGS recently signed a Cooperative Research and Development Agreement (CRADA), with LookClickPrint, Inc., to develop premium quality reproductions of Landsat 7 images from the USGS "Earth as Art" image collection (CRADA)

If you are a USGS Business or Cooperative Research and Development Partner, and have an online service which may [meet the criteria](#) for being listed on this page, please contact the USGS [Geography Webmaster](#)

[Privacy Statement](#)[Disclaimer](#)[FOIA](#)[Accessibility](#)

U.S. Department of the Interior || U.S. Geological Survey
12201 Sunrise Valley Drive, Reston, VA 20192, USA
URL: <http://geography.usgs.gov/partners/viewonline.html>
Maintainer: Geography Webmaster
Last modified: Tuesday, 22-Jul-2003 06:38 29 EDT

EXHIBIT 4

[Geography Home](#)[Partnerships](#)[Products](#)[Services](#)[What's New](#)

Criteria for Listing on "View USGS Maps and Images Online"

Following are the criteria that USGS partners must meet in order to be listed on the "View USGS Maps and Aerial Photo Images Online" site:

- Business Partner or Cooperative Research and Development Agreement Partner must have a current agreement in good standing with the USGS.
- Partner web site must provide a Web-based interactive viewer interface to featured USGS product(s) which is accessible, free of charge, to anyone with an industry standard Web browser.
- Data available for online viewing must represent a substantial proportion of the actual available coverage of the featured USGS dataset(s).
- Partner web site should prominently feature, at high level and in close relation to the viewer application, either the official USGS trademark or an acknowledgment of the USGS as the data source, with a link back to www.usgs.gov.
- Partner web site must be well maintained and kept current with respect to the featured USGS product(s).
- Partner web site must meet basic standards of taste and appropriate content as determined by the USGS.
- The partner site's copyright restrictions must be acceptable to the USGS - minimally allowing personal and non-commercial uses of USGS data or images displayed and downloaded through the interactive viewer.

The USGS reserves the sole right, based upon its interpretation of these criteria, to determine which partner web sites and viewing applications are suitable for listing and retention on its "View USGS Maps and Aerial Photo Images Online" page. The USGS also reserves the right to change these criteria or to discontinue this service at any time and without prior notice to its partners or to the general public.

If you think your service qualifies, contact the USGS Geography Webmaster for further information.

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U S Department of the Interior || U S Geological Survey
12201 Sunrise Valley Drive, Reston, VA 20192, USA
URL: <http://geography.usgs.gov/partners/viewcriteria.html>
Maintainer Geography Webmaster
Last modified Thursday, 15-May-2003 07:54 21 EDT

CERTIFICATE OF SERVICE

I, Carla M. Whitlock, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C. do hereby certify that a true copy of the Sur-Reply to Reply to Consolidated Response to Petitions For Reconsideration was sent on this 14th day of January 2004, via first class U.S. mail, postage prepaid to the following:

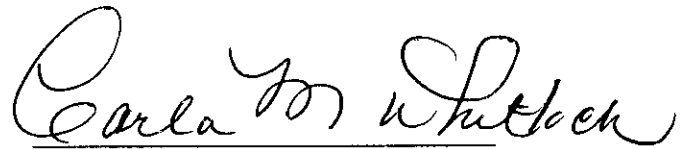
John Karousos, Esquire*
Assistant Chief, Audio Division
Media Bureau
Federal Communications Commission
The Portals I1
445 12th Street, SW
Washington, D.C. 20554

H. Barthen Gorman, Esquire*
Media Bureau
Federal Communications Commission
The Portals II
445 12th Street, S.W.
Washington, D.C. 20554

Barry A. Friedman, Esquire
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, D.C. 20036

Mark Lipp, Esquire
Vinson & Elkins, LLP
1455 Pennsylvania, NW
Washington, D.C. 20004-10008

Gary S. Smithwick, Esquire
5028 Wisconsin Avenue, NW
Suite 301
Washington, D.C. 20016


Carla M. Whitlock

cc: David Sinclair
Robert Sinclair
Jeff Brock